Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977-78

No. 77-1339

MICHAEL ROBINSON,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION TO DENY WRITS OF CERTIORARI TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

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The Respondent respectfully prays that Writs of Certiorari be denied to review the opinions and judgments of the Alabama Court of Criminal Appeals entered against the Petitioner in two (2) separate cases on October 4, 1977.

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals which are appended to the Petitioner's Arguments and filed in this Honorable Court marked, Appendix A and C are correct because no reversible error or errors were committed by the trial courts.

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. § 1257. (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending cases. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioner do *not* in the opinion of the writer present new questions for the first time nor present any special or important reasons for granting writs of certiorari. (Emphasis added) It appears that neither of these cases are cases of first impression and that the following quotation is applicable in view of the fact that no new question is being presented for the first time:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

1. Is Ordinance 74-18 of the City of Birmingham unconstitutional because it makes it optional whether or not the magistrate will personally view the subject matter prior to the issuance of a search warant?

2. Were the search warrants in question conclusionary?

STATEMENT OF THE CASE

1. The Petitioner was charged and convicted in two cases of violating Ordinance No. 76-2, Section 3 of the City of Birmingham, Alabama:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter."

In the obscene motion film entitled "Referral Service" the jury assessed a fine of $150.00 and the Court imposed 90 days hard labor to be performed for the City of Birmingham. In the other obscene motion film trial entitled "Pleasure Cruise" resulted in the jury and the Court respectively imposing the *maximum fine and punishment* of $300 fine and 180 days hard labor. (Emphasis added)

2. Motions to Suppress the Evidence filed by the Petitioner were properly overruled.

Motions referred to in this brief and argument will be prefixed by an "M" and transcript of the jury trial by a "T".

REASONS FOR DENYING THE WRITS

1. No new substantial constitutional question is presented.

A. In *Heller v. New York*, 93 S.Ct. 2789 (1973) the Court stated:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

This case did *not* mandate that the magistrate view the film. (Emphasis added) Further no demand by Petitioner was made that either of the films be returned to the exhibitor to be shown pending a judicial determination of obscenity vel non. Thus both films were lawfully seized as evidence.

B. The affidavits in the search warrants were *not* conclusory assertions of Officer David Luker, (Emphasis added), and the magistrate did focus searchingly on the issue of obscenity.

C. MARCUS, FREEDMAN, LEE ART, HELLER and ROADEN are cited by the Petitioner, Michael Robinson, alleging that the search warrants were issued based on the conclusory assertion of a police officer and the magistrate did not focus searchingly on the question of obscenity. The factual issues in those citations are not relevant to these pending cases.

The language in Justice Clark's opinion eloquently deals with some of the cases cited by Petitioner and will be embodied in this argument substituting the word Petitioner in place of Appellant which was made part of this record by Petitioner. (The correct citation for *McKinney v. City of Birmingham* is 296 So.2d 202

and not 96 So.2d 02 as cited by Petitioner. A portion of the opinion is hereby embodied.)

"A magistrate is required to focus searchingly on the question of obscenity before he issues a search warrant for the seizure of First Amendment material. *Marcus v. Property Search Warrant*, 367 U.S. 717, 732, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Condemned especially in *Marcus* is the acceptance by a magistrate of the conclusional statements in the affidavits upon which the warrant is issued.

We do not consider, as Petitioner apparently does, that the affidavit in this case consists of conclusions merely, or even substantially. They are primarily stark statements of fact. We think also that Petitioner is not justified in the conclusion that the magistrate did not question the affiant to obtain more information than that which was contained in the affidavit. It is true, as shown above, that the affiant did not remember that the judge questioned him about "the various scenes in the movie and where they were and what took place, when and with whom and however," but it is clear that there was a colloquy between the magistrate and the affiant with reference to what the affiant had viewed in the particular movie. It is also clear, as shown by the affidavit, that "any plot or story" of the movie was not dependent upon, and was unrelated to the pornography that had attracted its patrons at five dollars a person. Whatever the story or the plot, it served merely as an accompaniment, as sublime music, wrested from the sublime verse it usually accompanies, does when applied to a filthy parody; which sometimes has the claimed redeemng quality of humor, although no such quality is even claimed as to the matter under consideration.

We do not doubt that at times it is necessary for a magistrate to proceed further than the examination of the affiant in this case, to preserve the First Amendment rights of persons in possession of material claimed to be obscene. In many cases more

details would be necessary, the scheme is more delicately woven, the plan is more subtle, the nauseous scene more camouflaged. In this case, no more artistry is involved than in that of the hit-and-run pervert who scratches his vulgarisms upon the walls of the dirtiest public private places of the world, to vie with the surrounding putrescence from which the normal traveller as soon as possible retreats.

The blatant facts, as shown here, without any further detail enable the magistrate to make an assessment as a whole of the production, to the extent at least of determining the existence of probable cause for believing it was illegal. The searching focus required is necessarily relative and is dependent upon the object focused upon. In this case, no telescope, no microscope, no spectacles were required.

In arguing for the proposition that the search warrant was invalid, appellant states:

> "It is the petitioner's contention that the only manner in which the command of Marcus can be followed where a full length motion picture is alleged to be obscene is for the magistrate to view the movie. No other procedure can insure the required Constitutional scrutiny to this type of First Amendment material."

After searching for a case to support Petitioner, he candidly admits that he has found none, other than *Hess v. State*, 536 P.2d 366 (Okl. Cr. 1975), from which Petitioner quotes:

> "(the defendants) . . . contend that the trial court erred in overruling the defendants' motion to suppress the introduction of the seized film into evidence. In support of their contention the defendants argued that no magistrate viewed the film in an effort to focus searchingly upon the question of obscenity prior to the issuance of the warrant and that, therefore, the warrant was issued

> in violation of the explicit guidelines set down in the recent decision of the United States Supreme Court in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed. 2d 745 (1973). With this contention we agree. The record reflects that the Judge issuing the search warrant did not view the film prior to the issuance of a warrant. The facts in the instant case do not present exigent circumstances wherein immediate police action must be 'now or never' to preserve evidence. The film complained of was not stolen or contraband and was not in the process of being removed or destroyed. The failure of a neutral magistrate to view the film prior to the issuance of a constitutionally sufficient search warrant was error. See also S.Ct. 2796, 37 L.Ed.2d 757."

[3] We do not agree that it was necessary for the magistrate to view the film before he could issue a constitutionally sufficient warrant to authorize seizure. We do not think that *Heller v. New York*, supra, so held. As to the question of any necessity for the magistrate to view the film before issuing a search warrant, the Court in *Heller*, 413 U.S. 488, 93 S.Ct. 2792, said:

> ". . . In Lee Art Theater v. Virginia [392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313], supra, the Court went so far as to suggest that it was an open question whether a judge need 'have viewed the motion picture before issuing the warrant' . . ."

The Court also noted in *Heller* that "The judge viewed the entire film and, indeed, witnessed the alleged criminal act." The Court did not hold that such viewing by the magistrate was essential to issuance by him of a valid search warrant. Nor did this Court so hold in a case in which the magistrate himself viewed the film before issuing the warrant. *McKinney v. City of Birmingham*, 52 Ala. App. 605, 296 So.2d 197, cert. denied, 292 Ala. 726, 296 So.2d 202, cert. denied, 420 U.S.

950, 95 S.Ct. 1335, 43 L.Ed.2d 429. Noting the fact that the magistrate had seen the film, but not deciding that it was necessary for him to have seen the film, before issuing the warrant, Judge Tyson, now Presiding Judge, speaking for a unanimous Court, said:

> "Finally, we find that, since there was no request or demand by the appellant that the films in question be returned to the exhibitor to be shown pending a judicial determination on the issue of obscenity vel non, we find that such were lawfully seized as evidence in the several cases in question inasmuch as here there was a determination by a neutral and detached magistrate on the issue of obscenity prior to their seizure . . ."

We do not say that it is never necessary for the one who issues a warrant of search and seizure to view before hand the matter seized in order to protect one's First Amendment rights, but to require it in every instance is to say in effect that nothing can be so obscene that no witness can possibly describe it in such a way as to present a probable cause case, when in fact it is so offensive that it may be so described by a witness as to portray its illegality beyond any rational doubt, if not beyond cavil. The protection of First Amendment rights does not require that nothing be believed unless it is seen. Such a requirement is not to be found in any field of knowledge. Furthermore, we suggest a collision between any such requirement in an inordinate desire to protect First Amendment rights and another paramount principle, i.e., the independence, the neutrality and detachment of the judicial branch of government.

In *Freedman v. State of Maryland*, 85 S.Ct. 734, Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute.

There existed no statutory provision for judicial participation in the procedure which barred a film, nor assurance of a prompt judicial review. This resulted in an invalid prior restraint.

In substance *Freedman's* argument was that, the apparatus operated in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contained the same vice as a statute delegating excessive administrative discretion. No censorship statutes are involved in either of the two (2) cases presented. (Emphasis added)

Michael Robinson contends that the rule of laws as set forth in *Roaden v. Kentucky* (1973), 93 S.Ct. 2796, was not complied within the present case. In *Roaden* the Sheriff seized a film without a search warrant and the seizure was prior to a magistrate having an opportunity to "focus searchingly on the question of obscenity." In the case before this Court the contrary was true. The Judge focused searchingly on the question of obscenity and then issued the search warrant on film entitled, "Referral Service" (T. pages 36, 37 and 40) and "Pleasure Cruise" (M. pages 38 and 39).

The City of Birmingham further refutes the Petitioner's arguments and suggests that the *common thread* in all the cases which he cites were in the nature of the material seized and the manner in which they were taken by an officer without the authority of a constitutionally sufficient warrant, thereby constituting prior restraint. ***No prior restraint exists in these cases against Michael Robinson.*** (Emphasis added)

In the 6th Division 363, "Referral Service" Officer Luker testified in the transcript (T. pages 38 and 39) as to the length of the colloquy which took place between him and Judge Barnard.

> " 'Q. Officer Luker, approximately how long did—approximately what time was it that you went in to see Judge Barnard on the 11th of April prior to his executing this search warrant and arrest warrant?

'A. I don't remember, but in my best judgment it was more than likely right after his morning recess.

'Q. And how long were you with him approximately?

'A. Again, I don't remember the specific time for sure, but I would imagine no longer than 20 minutes.

'Q. Ten to 15 minutes be more accurate or do you think it was as much as 20 minutes?

'A. I would say between 10 and 20, no more than 20.

'Q. At that time did you state in detail what you saw in the movie Referral Service to Judge Barnard?

'A. Yes, sir.' "

In the 6th Division 274 "Pleasure Cruise" Officer Luker testified in the Motion (M. pages 38 and 39) as to the colloquy which took place between he and the magistrate and also the time element involved.

"Q. All right, sir, did you make an affidavit to him before he executed this search warrant—arrest warrant?

A. Yes, sir.

Q. Did he sign it in your presence?

A. Yes, sir.

Q. Do you recognize his signature?

A. Yes, sir.

Q. All right, sir, I show you Defendant's Exhibit 1, which is the search warrant and ask you to look at that. See if you recognize that instrument?

A. Yes, sir.

Q. All right, sir, who filled out that instrument on the front end or the back?

A. I did.

Q. All right, sir, and then what did you do next with that instrument?

A. Presented it to Judge Barnard.

Q. When you presented it to Judge Barnard, what, if anything, did you do at that time?

A. I swore to the affidavit and signed my name on the affidavit.

Q. All right, sir, and did he also sign his name in your presence?

A. Yes, sir.

Q. All right, about how long did the conversation take place between you and Judge Barnard at that time?

A. I would say not more than fifteen minutes.

Q. Did he question you at any time concerning the contents of this affidavit?

A. Yes, sir.

Q. Do you recall what, if anything, he asked you about this?

A. I recall a couple of the questions. He asked me was there actual intercourse; could I see clear penetration; were things I alleged actually happening in the film and could it be seen clearly.

Q. Did he read this entire exhibit, front and the back of Defendant's Exhibit 1 before he asked you these questions?

A. Yes, sir, it looked like it to me he read it.

Q. I notice on this exhibit, evidence, being introduced Defendant's Exhibit 1 that you said these acts took place on a boat, did you relate that to the magistrate at that time?

A. I don't remember saying that to him, no sir.

Q. But you could have, is that correct?

A. Yes, sir, I could have. It's in the warrant."

The search warrant (Re: Pleasure Cruise) was introduced into evidence in the Circuit Court and is set forth as part of the record (T. pages 163 and 164). It also contained detailed factual information which enabled the magistrate in this case to focus searchingly on the question whether or not there existed probable cause to believe the film to be obscene thus satisfying the requirements of Birmingham City Ordinance No. 74-18 (T. pages 172-174). A receipt for the seizure of the film was given to Michael Robinson (T. page 164).

Nowhere in *Officer Luker's affidavits* in his search warrants are there any reference *generally* to *"various types of sex acts." He is specific.* Further taking the colloquies together with the affidavits in the search warrants it is evident the procedures used were designed and did focus searchingly on the issues of the obscenity vel non of the materials in question. (Emphasis added).

State v. U & L Theatres Inc., 307 So.2d 879, cited by the Petitioner appears to be inapplicable because the facts are not the same and further there is no allegation nor proof that the films seized constituted the only available copies.

It is immaterial that Birmingham City Ordinance 70-5 passed in 1970 required the Recorder's Court judge to view a motion picture film to determine probable cause of its obscenity prior to his issuance of a search warrant for its seizure. This was before *Heller v. New York*, 93 S.Ct. 2789 (1973). Ordinance No. 70-5 was changed after this ruling by Birmingham City Ordinance 74-18. At the time of the issuance of these two (2) search warrants in question viewing was optional with the magistrate.

The affidavit in the search warrant introduced into evidence and before this Honorable Court pertaining to the film "Pleasure Cruise" (T. page 163) was sufficient to support it and was *not* "boiler plate" as alleged by Michael Robinson. (Emphasis added) In addition, facts were related to Judge Joseph G. Barnard by Officer Luker. A colloquy took place between these individuals with specific details regarding the sex acts, (M. pages 38-40). The Judge focused searchingly on the issue of obscenity.

It is not necessary all the evidence before the magistrate be stated in the affidavit. *Brandies v. State*, 44 Ala. App. 648, 219 So.2d 404.

On page 17 of his petition, Michael Robinson refers to an Oklahoma case without citing it in accordance with accepted citation procedures. No book nor page number is given. Further the date of the decision is not cited, therefore it should not be considered by this Honorable Court. If it is so considered, the Respondent points out that the facts are different. The affidavit in the search warrant was made by a District Attorney based on hearsay (information given to said District Attorney by police officers who had viewed the film). The facts in both cases are that Officer Luker viewed both films and related them directly to Judge Barnard.

It is obvious that the police officers do not determine whether or not probable cause exists. This is determined by the magistrate or judge to whom it is presented. The issuance of the warrant by the magistrate or judge certainly does not make the person making the affidavit a censor. On page 20 the Petitioner alleges basically that there was only a brief colloquy between the magistrate and the officers. This is refuted by the testimony in the record. In "Referral Service" no more than 20 minutes and in "Pleasure Cruise" no more than 15 minutes.

Page 21 of the Petitioner's argument, paragraph 1(c) apparently is an erroneous citation made because the third test under *Miller* does *not* include—(Material is not obscene simply because it contains discussions on portrayals of sex). (Emphasis added)

Michael Robinson apparently criticizes the Alabama Court of Criminal Appeals for viewing the films by stating the obscenity of the films is not and should not be an issue in this cause. Yet in *Miller v. California*, 93 S.Ct. 2607 at page 2756 citing Mr. Justice Harlan's opinion in *Roth*, he stated:

> "I do not understand how the Court can resolve the constitutional problems now before it without making its own indepedent judgment upon the character of the material upon which these convictions were based." (354 U.S., at 498, 77 S.Ct., at 1316.)

Not only did the juries render their independent judgments upon the character of the materials involved in these cases but the Alabama Court of Criminal Appeals also made its own independent judgment. The fact the Petitioner wants to avoid the issue of obscenity is immaterial.

Petitioner's brief, Appendix A (A.1-A.16) contains the excellent, eloquent and scholarly opinion written by Judge Clark in reference to the obscene motion picture film entitled "Referral Service" in which he affirmed the judgment and/or conviction appealed from. Justice Harris adopted as the law in the obscene motion picture film entitled "Pleasure Cruise" the opinion written by Judge Clark and affirmed the conviction also.

CONCLUSION

For the foregoing reasons, Writs of Certiorari should be denied to review the opinions and judgments of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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